No. 11037.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

James H. Collins, Sidney Fischgrund, and Christopher E. Schirm,

Appellants,

vs.

United States of America,

Appellee.

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

OPENING BRIEF OF APPELLANTS.

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FOR THE NINTH CIRCUIT

JAMES H. COLLINS, SIDNEY FISCHGRUND, and CHRISTOPHER E. SCHIRM,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANTS.

Statement of the Case.

The Indictment in this case was filed in the Central Division of the United States District Court for the Southern District of California on February 4, 1942, and named as defendants James H. Collins, Sidney Fischgrund, Fred V. Gordon, John H. Morgan and Christopher E. Schirm. It charged all of the defendants with the violation of the Securities Act of 1933 as amended — Section 17(a)(1), Securities Act of 1933 (15 U. S. C. Section 77q(a)(1)), and with violations of the Mail Fraud Statute — Section 215 of the Criminal Code (18 U. S. C. 338), and with conspiracy to violate the Securities Act and the Mail Fraud Statute (18 U. S. C. 88).

The case was called for trial before the court and a jury beginning July 5, 1944. The defendants Fred V. Gordon and John H. Morgan were acquitted on all counts and the defendants James H. Collins, Sidney Fischgrund and Christopher E. Schirm (hereinafter referred to as appellants) were acquitted on all counts except the Conspiracy Count (Count Eleven) upon which Eleventh Count they were found guilty [Tr. R. 90, 91, and 92].

Motions for arrest of judgment [Tr. R. 96], *Motions for a new trial* [Tr. R. 94], and *motion to vacate the judgment of conviction and to discharge the defendants notwithstanding the verdict* [Tr. R. 92] were filed by the appellants and each of said motions was denied and exception allowed [Tr. R. 97]. Thereafter the trial court "ordered and adjudged that the imposition of sentence is suspended one year" [Tr. R. 98, 99, 100].

Thereupon these appellants filed their notices of appeal [Tr. R. 101, 102, 104]. The appeal was perfected before the Ninth Circuit Court of Appeals.

A motion was there made to dismiss the appeals, in short, upon the ground that no sentence had been passed and the appeals were therefore premature. This first appeal was docketed in the Ninth Circuit Court as No. 10846. The cause was remanded to the lower court for further proceedings and thereupon the United States District Court for the Southern District of California, Central Division, Hon. Paul J. McCormick, Judge presiding, imposed judgment and commitment as to each

appellant committing each appellant "to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year in a Federal jail, said term of imprisonment to be suspended for a period of two (2) years, and said defendant is placed on probation for said period of time . . ." [Tr. R. 118, 119, 121].

Notices of appeal were thereupon served and filed by each of the appellants [Tr. R. 122, 123 and 125].

Under a stipulation of the parties, the court then made an order [Tr. R. 126] "that the Assignments of Errors, Bill of Exceptions, and Clerk's Transcript heretofore certified by the clerk of the above entitled court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the latter court's No. 10846, may be adopted by reference as Assignments of Errors, Bill of Exceptions and Clerk's Transcript in connection with the notices of appeal filed with this court by said appellants on April 13 and 14, 1945."

Statement of the Facts.

Union Associated Mines Company was a Utah corporation with its principal office at Salt Lake City. The Indictment charged that beginning about June 1, 1938, and continuing to about December 1, 1939, the defendants devised a scheme and artifice to defraud various persons who might be induced to purchase stock of Union Associated Mines Company. As part of the scheme it was alleged that the defendants would incorporate Plymouth Oil Company in California, of which the defendants Gordon and Fischgrund would be president and vice-president, respectively, and one Guy B. Davis would be secretary-treasurer. It was charged that under the scheme the defendants would purchase shares of stock of Union Associated Mines Company at prices of ¼ of a cent to ½ cent a share; that defendants would cause an agreement to be made between Plymouth Oil Company and Union Associated Mines Company under which Plymouth Oil Company would convey to the Union Associated Mines Company a certain interest in the production of two oil wells in return for certain shares of stock of Union Associated Mines Company; that the defendants would engage in creating a false market on Union Associated Mines Company stock and that certain false representations would be made as to the persons who owned interests in the Plymouth Oil Company and as to the production of the wells drilled by the Plymouth Oil Company, etc. These representations were alleged to be false and it is asserted that the mails were used in furtherance of a scheme to defraud and in the sale of securities.

The Eleventh Count charged a conspiracy to do the things referred to in the First Count of the Indictment.

Brief Statement of the Questions Involved.

Briefly stated, the questions involved in this appeal may be resolved into nine points, viz.:

Point I. Error in denying motions to quash.

Point II. Error in denying appellants' motions to dismiss made prior to the time when the case was called for trial.

Point III. Error in denying the motions to dismiss on the grounds of insufficiency of the evidence.

Point IV. Error in denying motions for arrest of judgment and to vacate judgments of conviction notwithstanding the verdicts.

Point V. Errors in admitting in evidence minutes of Union Associated Mines Company.

Point VI. Error in admitting in evidence the testimony from the witness Harold V. Dodd.

Point VII. Error in admitting in evidence the testimony of Paul Julian Howard as to assessed value of certain land.

Point VIII. Error in admitting in evidence the testimony of Frank L. Tucker and Frank Veloz, and in refusing to strike such testimony.

Point IX. Error in denying motion to strike certain documentary evidence and oral testimony introduced through witnesses Mathilda M. Klinger and others.

POINT I.

Error in Denying Appellants' Motions to Quash Indictment Herein Upon Each and All of the Grounds Set Out in Said Motions.

Under this heading we purpose to discuss the assignment of Error I [Supp. Tr. p. 601] reading as follows:

"I.

"The District Court erred in denying Appellants' motions to quash the indictment herein upon each and all of the grounds set out in said motions to quash and requiring them to plead to the said indictment."

The record in this case as to the proceedings before the Grand Jury shows that the indictment herein was returned on February 4, 1942; that on the same day, a new Grand Jury was impaneled; that on the same day seventeen separate indictments were returned; that the indictment herein consists of thirty-two typewritten pages, and the defendants herein are charged with ten substantive counts of violation of the Mail Fraud Statute and the violation of the Security and Exchange Act, and one count of conspiracy to violate both Statutes. The indictment charged, among other things, that the defendants conspired to commit fraudulent stock manipulations, rigging of the stock market, technical inter-corporate transactions, information in reference to oil production and representations made thereof, and other matters of like scope. It is a physical and practical impossibility that sufficient competent evidence could possibly have been offered before the Grand Jury so that an indictment could properly be considered. The Grand Jury returned seventeen indictments on the same day, and it being a new

Grand Jury, the courts exercising the judicial knowledge that they have acquired during their years of practice and on the bench, must recognize the physical impossibility of the Grand Jury hearing any competent evidence justifying the return of the indictment, and we must recognize the fact that the Grand Jury must have returned the indictment purely on the hearsay statement of a government investigator [Tr. R. pp. 39-48].

An indictment will be quashed where there was no evidence whatever, or no competent evidence, of the offense charged, presented to the Grand Jury.

Brady v. United States, 24 F. (2d) 405.

The law is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolably, however crushing may be the pressure of incriminating proof.

Snyder v. Mass. 291 U. S. 97, at p. 22.

In the 8th Circuit Court of Appeals, it is the settled rule that an indictment will be quashed where there was either no evidence whatever or no competent evidence of the offense charged, presented to the Grand Jury.

Nanfito v. United States, (C. C. A. 8th) 20 F. (2d) 376, 378;

Murdick v. United States, (C. C. A. 8th) 15 F. (2d) 965, 967;

Anderson v. United States, (C. C. A. 8th), 273 Fed. 20, 29;

McKinney v. United States, (C. C. A. 8th) 117 C. C. A. 403, 199 Fed. 25, 33.

We think the same rule should be applied where a grand jury returns an indictment without any evidence whatever before it of a separate distinct, and essential element of the offense, such as the use of the mails.

People v. Price, 6 N. Y. Crim. Rep. 141, 2 N. Y. Supp. 416, id. 119 N. Y. 650, 23 N. E. 1149;

People v. Fishman, 118 Misc. 738, 194 N. Y. Supp. 887.

In *People v. Price, supra,* the Court among other things, said:

> "The doctrine that a grand jury may indict without evidence, if tolerated, would establish a precedent subversive of the liberty of the citizen, and his safety and security, and the good name and fame of any innocent person might at any time be blasted."

What transpired before the grand jury may be shown, no matter by whom, whenever it becomes essential to protect the individual rights of the accused, who has the constitutional right to insist that the indictment against him be based upon sufficient and competent legal proof.

United States v. Silverthorne, 265 Fed. 853, 855.

In *United States v. Rubin,* 218 Fed. 246, the indictment was quashed on the ground that it appeared that the main witnesses had no personal knowledge of the facts to which they testified, they merely giving information as they obtained it by investigations.

It goes without argument that an indictment must be based on competent evidence. Parties should not be indicted on mere hearsay or other incompetent evidence but the mere fact that there may have been improper evidence before the grand jury is not sufficient to vitiate an in-

dictment if there was any competent evidence upon which such indictment might be found. If it effectively appears in some manner that there was no competent evidence before the grand jury on which to base an indictment, and that question is seasonably and properly raised, the Court should of course take proper action thereon.

Murdick v. United States, 15 F. (2d) 965, 967.

Judge Kenyon, in the Murdick case, further said, on page 968:

> "There is no divinity surrounding grand jury proceedings, and the Court has the right to go behind the secrecy imposed upon a grand jury as to its proceedings, where the interests of justice demand it."

He further states:

> "If defendants can show that an indictment was returned against them entirely on incompetent evidence, they can present the matter by motion to quash."

In *United States v. Swift,* 186 Fed. Rep. 1002, the Court states:

> "The cases are uniform to the effect that, except in those States in which by statute indictments are required to be returned on 'legal' or 'competent' evidence, the courts will not review the evidence received by the grand jury for the purpose of passing upon its competency."

The State of California, in Section 919 of its Penal Code, states particularly, among other things, the following:

> "The Grand Jury can receive none but legal evidence and the best evidence in degree to the exclusion of hearsay or secondary evidence."

The case of *Greenberg v. Superior Court,* 19 Cal. (2d) 319, at page 321 of said Reports, states as follows:

> "A grand jury is no Star Chamber tribunal empowered to return arbitrary indictments unsupported by any evidence. * * * A grand jury that indicts a person when no evidence has been presented to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution and the laws of the State of California, and encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty. * * * Such an indictment is void and confers no jurisdiction upon a court to try a person for the offense charged."

Hearsay evidence is incompetent and therefore is no evidence at all. As long as the grand jury is utilized, it must function properly. If it does not function properly, and if it returns an indictment against an individual without observing the laws and rules of evidence, and returns an indictment on the ex-parte statements of an investigator for the Securities and Exchange Commission, the Constitutional rights of the defendant are violated because there is no due process.

The State of California, recognizing the constitutional rights and presumptions that a defendant in a criminal case is entitled to, requires that evidence receivable before a Grand Jury must be none but legal evidence and the best evidence in degree to the exclusion of hearsay or secondary evidence. (Sec. 919, Penal Code, State of California.) [Tr. R. 39-48.]

The new rules of criminal procedure for the District Courts of the United States (House Document #12,

letter from the Attorney General of January 3, 1945, Rule 6(e), page 7) reads in part, as follows:

> "A juror, attorney, interpreter or stenographer may disclose matters occurring before the Grand Jury only when so directed by the Court preliminarily to, or in connection with, a judicial proceeding, or when permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictments because of matters occurring before the Grand Jury."

The foregoing is evidence of the fact that a Judge may, if grounds are sufficient, allow the proceedings before the Grand Jury to be examined into. We will assume that it being a matter for a Judge to determine, it is a matter of judicial discretion. In the instant case, the refusal of the Judge to permit the defendants to examine into the minutes of the Grand Jury on the *prima facie* showing made, is an indication of an abuse of discretion.

"Judicial discretion" is substantially synonymous with judicial power. The term "discretion" is an impartial discretion guided and controlled in its exercise by fixed, legal principles; a legal discretion to be exercised in conformity with the spirit of the law and in the manner to subserve and not to defeat the ends of substantial justice. (*Griffin v. State,* 88 S. E. 1080.)

It seems far more important, to safe-guard the liberty of a citizen, that the basic formula through which a man is accused of crime should be a formula premised on a solid foundation of legal evidence properly adduced. If a motion lies by a defendant to quash an indictment, if the pleading is not proper, or if the return is insufficient, then surely that same right should be more properly given

to a defendant when the original proceedings are not legally complied with.

An indictment returned on no evidence (the evidence herein being incompetent and therefore being no evidence at all) upon which a defendant would be required to stand trial, should be quashed upon proper showing made by reason that a requirement to go to trial on an indictment illegally or wrongfully returned would be depriving the defendant of the constitutional rights given him under the due process clause under Amendment 5 of the Constitution.

To require the defendant to go to trial on charges set forth in an indictment illegally or wrongfully obtained would be a violation of the defendant's constitutional rights under Amendment 6 of the Constitution.

POINT II.

Error in Denying Appellants' Motions to Dismiss Said Indictment Made Prior to the Time When Said Cause Was Called for Trial.

Under this heading we purpose to discuss the assignment of Errors II and III [Supp. Tr. R. p. 602] reading as follows:

"II.

"Said District Court erred in denying appellants' motions for an early trial of said cause.

III.

"Said District Court erred in denying appellants' motions to dismiss said indictment made prior to the time when said cause was called for trial."

The grounds of said motions were, and the grounds of said error in denying said motions were and are those set out in said motions to dismiss [see Tr. R. pp. 49-90].

These defendants were indicted on February 4, 1942. The indictment charges that the defendants, commencing in 1938 and ending in 1939, committed the acts set forth. The case was set for trial on June 4, 1942, at which time all of the defendants were present in person, and represented by their attorneys ready for trial. At that time, in an open court, H. V. Calverley, Assistant U. S. Attorney, appearing as counsel for the Government, addressed the Court, and stated that he had written for authority from the Attorney General, to dismiss the case by reason of the fact that his examination of the files, records and statements, convinced him that there was not sufficient evidence to convict, and that justice would be served by a dismissal. The Court thereupon continued the case for the term for setting. Thereafter the cause was continued from term to term — from September, 1942, until February, 1944, on which date the February term calendar was called, and the case was set for trial for April 18, 1944, and on March 13, 1944, on the Court's own motion, it was ordered that an Order setting the cause for trial for April 18, 1944, be vacated, and the Cause was transferred to Presiding Judge Paul J. McCormick for re-assignment. The latter motion and order was made without the appearance or consent of the defendants. Thereafter, in the court room of Judge Harry Hollzer, the matter was set for trial for July 5, 1944, and Judge Dave W. Ling of Arizona was assigned as trial Judge [Tr. R. 53-54].

A motion was made before Judge Ling to dismiss on the grounds that the constitutional rights of the defend-

ants as granted to them by Amendment 6 of the Constitution of the United States, had been denied, and that they had not enjoyed the right to a speedy trial. The motion was denied and exception was noted [Tr. R. pp. 49-90].

Amendment Six of the Constitution of the United States reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *"

The wording of the Sixth Amendment is clear and explicit. The question is, what is a speedy trial. Congress has not in its legislative actions set forth a definite time limitation, so the question of what constitutes a speedy trial must be determined by what is reasonable and by precepts of example and by what other legislative bodies have determined constitute a time limit within which to bring defendants to trial.

The legislature of the states of California and Arizona have determined that unless a defendant is brought to trial within sixty days after an indictment or information has been found, that the defendant must be dismissed.

In the case of *Harris v. Municipal Court,* 209 Cal. 55, the Court says:

> "Section 13 of article I of the Constitution of California provides in part as follows: 'In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial.' This provision of the Constitution is self-executing. (*In re Alpine,* 203 Cal. 731 (58 A. L. R. 1500, 265 Pac. 828); *In re Begerow,* 133 Cal. 349 (85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 828.) It reflects the letter and spirit of the following provision of the federal Constitution to the same effect: 'In all

criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . .' (U. S. Const., art. VI, sec. 1.) This is a fundamental right granted to the accused and has been the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act. (*In re Begerow, supra.*) The policy of the law in this respect has been further declared by the legislature and by constitutional amendment in this state. * * *"

". . . It will thus be seen that the time within which criminal cases should be disposed of has been and is a matter of great public concern, and the duty is imposed upon courts, judicial officers and public prosecutors, to expedite the disposition thereof.

What is a 'speedy trial,' as those words are used in the Constitution? The legislature in section 1382 of the Penal Code has declared that unless a defendant in a felony case has been brought to trial within sixty days after the finding of the indictment or the filing of the information, the court must, in the absence of good cause shown for the delay, dismiss the prosecution. Thus the legislature by necessary inference has said that a trial delayed more than sixty days without good cause is not a speedy trial, and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision."

It is true that there are several United States Circuit Court cases, particularly the case of *Phillips v. United States*, 201 Fed. 259, and *Worthington v. United States*, 1 F. (2d) 154, which hold that in order for a defendant to avail himself of the right given under Amendment VI, that it is incumbent upon him to demand a trial and if he does not do so, that then he waives the right. That theory does not apply in the present cause.

In this case, these defendants appeared in Court ready for trial two years and one month prior to the trial date, at which time the Assistant United States District Attorney stated in open court that there was not sufficient evidence to convict and moved for a dismissal subject to the rule of the office to receiving permission from the Attorney-General in Washington. By his statement to the Court, the defendants were lulled to a point of inactivity. The assumption was natural that the consent of the Attorney-General in view of the recommendation of his representative, was unquestioned.

The situation that the defendant Collins found himself in is a glaring example of what was a natural sequence of the statement of the District Attorney. The fact that since the motion was made, witnesses necessary for the proper defense of the case were in the Army and unavailable as witnesses, is another natural sequence of the delay in the case. We must face the actual fact that the memories of man are frail and that the facts attempted to be adduced in this particular cause are facts that took place in 1938, commencing about the month of August, and continuing until about March or April of 1939. Either the witnesses will have forgotten conversation or their memories will concoct imaginative facts in line with what they thought happened but what most likely did not happen.

The right to a speedy trial as that right is granted under the Constitution, was given because Congress and the people recognized that an accusation of crime is serious; that it affects the reputation of the man accused; that it should be speedily disposed of so that if an innocent man is charged with a crime, he may be exculpated promptly and not be questioned by reason of the indict-

ment or charge. It was also included as a constitutional amendment by reason of the fact that it was recognized that unless a man was tried with reasonable diligence as far as time was concerned, that witnesses would forget the facts surrounding the matter; that witnesses would be unavailable or could not be located; that witnesses might die.

In the case of *United States ex rel. Whitaker v. Henning,* 15 F. (2d) 760, the Court, in considering whether mandamus would apply requiring the trial of a man who at the time of the petition was incarcerated in the federal penitentiary, states on page 761:

> "The reason for the majority rule is well stated in State v. Keefe, 17 Wyo. 227, 98 P. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161: 'The right of a speedy trial is granted by the Constitution to every accused. A convict is not excepted. He is not only amenable to the law, but is under its protection as well. No reason is perceived for depriving him of the right granted generally to accused persons, and thus in effect inflict upon him an additional punishment for the offense of which he has been convicted. At the time of defendant's trial upon the one information, he was under the protection of the guaranty of a speedy trial as to the other. It cannot be reasonably maintained, we think, that the guaranty became lost to him upon his conviction and sentence, or his removal to the penitentiary. Possibly in his case, as well as in the case of other convicts, a trial might be longer delayed, in the absence of a statute controlling the question, than in the case of one held in jail merely to await trial, without violating the constitutional right, for an acquittal would not necessarily terminate imprisonment. However, the purpose of the provision against an unreasonable delay

in trial is not solely a release from imprisonment in the event of acquittal, but also a release from the harrassment of a criminal prosecution and the anxiety attending the same; and hence an accused admitted to bail is protected as well as one in prison. Moreover, a long delay may result in the loss of witnesses for the accused as well as the state, and the importance of this consideration is not lessened by the fact that defendant is serving a sentence in the penitentiary for another crime." See, also, Frankel v. Woodrough (C. C. A.) 7 F. (2d) 796, and the cases there cited."

A speedy trial is one had as soon after indictment as the prosecution can with reasonable diligence prepare for it, regard being had to the terms of court; a trial conducted according to fixed rules, regulations and proceedings of law free from vexatious, capricious and oppressive delays.

22 Corpus Juris Secundum 716;
People v. Molinari, 67 Pac. (2d) 767 (Cal.);
State v. Carrillo, 16 Pac. (2d) 965, 41 Ariz. 170;
Von Feldstein v. State, 17 Ariz. 245, 150 Pac. 235.

It is our contention that it is not the duty of the defendants to ask that the case be tried as is held in the *Phillips* case. When a defendant is charged with a crime by indictment, it is incumbent upon the government to follow the letter and spirit of the law. It is not incumbent upon the defendant to point out to the government its failure to comply with the spirit and letter of the law, as well as the explicit wording of the Constitution. The onus is on the government, not on the defendants. If it were otherwise, an indictment could be pending against a man for a lifetime.

Enlarging upon the above thought, the Court states in *State v. Carrillo,* 41 Ariz. 170, as follows:

> ". . . As we read the law, defendant is not required to request a trial. He is not the moving party. It is the state that initiates the accusation, and any delay in its prosecution, except for most cogent reasons, is not contemplated or justifiable. If the state can excuse itself for not bringing the accused to trial, then the onus for celerity is shifted to the accused. There is no intimation in the law that the accused must request a trial before he may claim the right to be dismissed for failure on the part of the state to bring on the prosecution within the limit fixed by law. If the trial is postponed for any reason other than some cause attributable to the accused, in the absence of a showing of good cause for the postponement, it must be dismissed."

When an established procedure is departed from, it may, as in the instant case, lead to the impairment of substantial rights of the defendants. All substantial rights belonging to defendants should be respected. If a substantial right of a defendant is not respected, the same procedure applied to all men placed in the same position would illegally deprive defendants of life and liberty. It is necessary for the protection of all men that we do not have one procedure for one defendant and another procedure for another defendant. To say that in one case defendants may not be brought to trial for years after an indictment has been found and in another case to have a judge require the defendant to go to trial within one week after an indictment is found, is not proper procedure.

Based on the facts as shown in this case, and if this procedure were to be permitted, a court would have little defense if an attorney were to say, "I wish continuance

after continuance for term after term by reason of the fact that it was done in a case titled, United States v. Collins, *et al.*" If the government can act as it does in the instant case, it can act that way in every case.

We believe that particularly appropriate statement found in the late case of *People v. Rodriguez,* 58 Cal. App. (2d) 424, 425:

> "We find particularly appropriate in this connection remarks of former Chief Justice Bleckley of the Supreme Court of Georgia, delivered to the Georgia Bar Association and printed in its annual report (1886) as follows: 'Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the Court or the jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man, if the debt, or the title, or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fail, it must be justice of substance, for without justice of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a court to stray from justice of procedure in order to administer justice of substance.' "

POINT III.

Error in Denying Motions Made by Appellants to Dismiss on the Grounds of Insufficiency of the Evidence to Justify a Conviction.

Under this heading we purpose to discuss the assignment of Errors IV and V [Supp. Tr. pp. 602, 603] reading as follows:

"IV.

"Said District Court erred in denying the motions made by them at the close of the plaintiff's case in chief to acquit them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, on each and all of the counts in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were and are that the indictment does not state a cause of action or state offenses against said moving defendants, and that the proof before the court was, and is, insufficient to hold them, the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, to answer any of the counts in said indictment.

V.

Said District Court erred in denying their motions made by them at the close of all of the evidence in the case, to dismiss each and every count of the said indictment, and to acquit them on each and every count in said indictment. The grounds of said motions were, and the grounds of said errors in denying said motions were, and are, that the evidence adduced was and is insufficient to hold them,

> the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm, and would not and does not tend to prove that the said Sidney Fischgrund, James H. Collins, and Christopher E. Schirm are guilty in any manner or form as charged in said indictment or any count thereof."

Upon the conclusion of the Government's case, a motion was made on behalf of all of the defendants for a directed verdict and for a dismissal of each and every defendant on the grounds that the evidence as adduced by the Government was not sufficient under the indictment to present any question to the jury [Tr. R. 491, 499], and said motions were denied and exceptions noted [Tr. R. 499-500.]

Upon the conclusion of the taking of evidence the motion was again renewed as to all the defendants and as to each and all of the counts of the indictment, which motions were again denied by the Court and exceptions taken [Tr. R. 584-585].

The defendants having been acquitted on all counts of the indictment except the conspiracy count, causes us to look into the record to see what, if any, evidence of a conspiracy among these defendants was adduced justifying their conviction.

Stripped of legal verbiage, the facts in the case are as follows: On August 19, 1938, the Plymouth Oil Company was incorporated under the laws of the State of California, with the original Directors, Fred V. Gordon, Sidney Fischgrund and Guy V. Davis [Tr. R. 382-386]. An aggregate of $100 par value of its capital stock was authorized to be issued to the Directors named in the Articles of Incorporation by the Division of Corporations

of the State of California on September 19, 1938, which shares were required to be escrowed, and which shares were deposited with R. A. Dunnigan as escrow holder, approved by the Division of Corporations [Tr. R. 379-381]. During the month of August, 1938, there was an oil boom in the Torrance District in Los Angeles County, and the Plymouth Oil Company acquired certain leases in the immediate vicinity of 237th Street, between Narbonne and Eshelman, in the Torrance field.

Christopher E. Schirm, who was in the oil business in Los Angeles at that time, knew John H. Morgan who was an attorney in Salt Lake City, Utah, and during the month of August, 1938, there was correspondence between Mr. Schirm and Mr. Morgan in reference to the possibilities of making money through the acquisition of an oil lease in Torrance, and drilling for oil [Tr. R. 214-223]. The Union Associated Mines Company was a Utah Corporation, which at one time had been listed on the Salt Lake City Stock Exchange, but had been inactive; and which Company had levied a total of eight assessments upon its stock between 1931 and 1935 [Tr. R. 135]. The Union Associated Mines Company owned certain mining claims in what was known as the "Cottonwood District" in Utah, but no work had been done on the claims for many years. The Union Associated Mines Company had been suspended in Utah for non-payment of franchise fees and tax [Tr. R. 134] and was delisted on the Salt Lake Exchange Dec. 18, 1936 [Tr. R. 202]. As of December 31, 1937, the Union Associated Mines Company had outstanding 789,229 shares [Tr. R. 200].

E. Byron Siens who was dead at the time that the indictment was returned, negotiated on behalf of the

Plymouth Oil Company with the Union Associated Mines Company, and a transaction was completed whereby on September 21, 1938, the Union Associated Mines Company, in exchange for 635,000 of its shares, received from the Plymouth Oil Company a 50% gross overriding royalty on the well proposed to be drilled by the Plymouth Oil Company in the Torrance field. In addition to receiving the 50% gross overriding royalty, the Union Associated Mines Company received 25% of Plymouth Oil Company's interest in certain oil and gas leases and agreements, covering twelve parcels of land in property located in Los Angeles County [Tr. R. 251-256]. The Plymouth Oil Company in the said agreement, agreed to drill an oil well to a depth of approximately 5000 feet, and no costs of any kind or nature were to be assessed against the Union Associated Mines Company. The well was drilled by the Plymouth Oil Company at a cost to it of approximately $40,000, and the well came in a producer on December 14, 1938 [Tr. R. 554]. The initial production was estimated from 225 to 250 barrels by the Superintendent of drilling, Guy V. Davis, and he so told the members of the Plymouth Oil Company [Tr. R. 555]. The gross number of barrels produced from the well from December 14, 1938, to December 31, 1938, was 2045.4 barrels, and Mr. Davis notified the Union Associated Mines Company as to the total.

John J. Wents, Jr., who qualified as an appraiser of oil properties, testified that a 1% overriding interest with nothing deducted for the cost of operation in the neighborhood wherein the well was drilled, was worth about $1200.00, if the well was a contemplated well or a well which was drilling. If the original production of the

well was 124 barrels per day and at the end of the month of December, 1938, production was approximately 100 barrels per day, the value of a 1% overriding interest was $1400.00 [Tr. R. 516].

There were about 55 or 60 wells drilled in the immediate vicinity of 237th Street and Eshelman, Torrance, in 1938 and 1939. Based on the figures of Mr. Wents, the 635,000 shares of stock given to Plymouth Oil Company by Union Associated Mines Company in exchange for the 50% gross overriding interest on Mr. Wents' statement would be of the value of about 10¢ per share while the well was being drilled, and would be worth about 11¢ per share when the well came in.

The defendants' fraud, as alleged in the indictment, is that the stock was selling at an inflated value when it was sold up to 5¢ per share.

A subsequent contract between Plymouth and Union was entered into on January 5, 1939, wherein Plymouth assigned to Union a 40% participating interest in a second well in the same vicinity in exchange for 635,000 additional shares of Union's capital stock. Mr. Wents' testimony is that such interests would be worth about $800.00 a per cent. These contracts were negotiated on behalf of Plymouth Oil Company by E. Byron Siens, and on behalf of Union Associated Mines Company by their officers duly authorized to sign these agreements. These contracts were drawn by Sidney Fischgrund and Richard Dunnigan as attorneys for the Plymouth Oil Company [Tr. R. 257-264].

The original 635,000 shares were issued in the name of Chris Schirm, in one certificate, dated September 21, 1938. This certificate was later returned and thereafter

re-issued into smaller denominations on September 27th and 28th, 1938, and totalled 635,000 shares in the name of Chris Schirm. A second issuance of 635,000 shares was made on February 25, 1939, and was in the name of the Plymouth Oil Company, for the interest in Plymouth well #2. This certificate was never re-issued and was left in that denomination [Tr. R. 195]. Chris Schirm was the nominee of the Plymouth Oil Company, and the stock was issued in his name for convenience only [Tr. R. 539]. There is not one bit of evidence showing that Mr. Schirm received one penny or one share as consideration for anything that he had to do with the transaction. Mr. Schirm severed his connection with the deal in the latter part of 1938, and according to the evidence, had nothing further to do with it [Tr. R. 184-185]. There is no evidence that Mr. Schirm and the defendant Collins knew each other, or had ever met.

Sidney Fischgrund is a young lawyer who prepared the Articles of Incorporation of the Plymouth Oil Company, and thereafter acted in the capacity of Vice-President and Attorney for the Company. He had had no previous experience in oil matters, except that he and his mother owned a lot in Wilmington, California, which was producing some oil. He never received any money from the Plymouth Oil Company or the Union Associated Mines Company [Tr. R. 530]. He, himself, purchased stock in the Union Associated Mines Company to the extent of $500.00 [Tr. R. 549]. He bought the stock because he felt that he was making a good buy on the market. Mr. Fischgrund also prepared the contract between James H. Collins and E. Byron Siens; and Mr. Fischgrund owned four-tenths of the capital stock of

the Plymouth Oil Company and was interested in seeing that it was a success [Tr. R. 532-533]. Mr. Fischgrund drew other contracts, but outside of acting as attorney for the Company, he had no actual participation in any sales made of Union Associated Mines Company stock, except the actual *bona fide* purchases of stock which he made for himself and his family and which he still retains today.

James H. Collins was a stock salesman who entered into a written agreement on January 17, 1939, with E. Byron Siens, wherein Collins agreed to purchase one million shares of Union Associated Mines Company stock on a sliding scale, at prices ranging from 2½¢ per share to 30¢ per share. The stock was to be taken up monthly, commencing February 1, 1939, to the amount of 83,333 shares per month [Tr. R. 284-289]. Collins sold a portion of the stock that he had contracted to purchase to John McEvoy, another stock salesman, who paid Collins the same price that the stock cost Collins. McEvoy would then make a profit by selling out at an increased price to various investors. McEvoy sold stock to five of the individuals set out in the substantive counts of Mail Fraud. Collins sold for a couple of months and then withdrew from the deal, and subsequently filed a civil action against the Plymouth Oil Company arising out of the contract of January 17, 1939 [Tr. R. 301].

The two wells in which Union Associated Mines Company was interested, greatly declined in production, to the point where the return was very small.

The Union Associated Mines Company on August 1, 1939, declared a dividend payable August 30, 1939, of $1.00 per 1000 shares on the issued and outstanding stock of record, except the 635,000 shares delivered

to the Plymouth Oil Company on Well #2 which 635,000 shares were delivered ex-dividend as per contract between the two companies. Up to August 1, 1939, Union Associated Mines Company had received as income from the proceeds of Plymouth Well #1, the sum of $4115.22. [Ex. #5 in evidence.] No one of the three defendants had anything to do with a declaration of the dividend or the disbursement of the income of Union Associated Mines Company. There were collateral matters brought out in evidence which in no way changes the picture above set forth as to the activities of the three defendants who stand convicted of conspiracy.

In practically all cases involving violations of the Mail Fraud Statute and the Security and Exchange Act, where there is a multiplicity of defendants, defendants are usually segregated into two groups; one group is usually designated by counsel and the Court as "main" defendants; the other group is usually designated as "minor" defendants. It is strange but true that in the instant case, the main defendants, Fred V. Gordon and John H. Morgan were acquitted. The minor defendants were convicted. It is also strange but true that if there was a conspiracy, and we can see not one scintilla of evidence to that effect, that J. A. Barclay, President of the Salt Lake City Stock Exchange, and E. Byron Siens, who bent the laboring oars, are both dead. It is also strange to note that Arthur P. Adkisson and Guy V. Davis, both of whom were named as co-conspirators were

not indicted, and the evidence shows that A. P. Adkisson was the man who went to Salt Lake City and placed progressive bids for the stock. There is no showing that he had any discussion of any kind with any of the three defendants convicted. Mr. Adkisson, a prosecution witness, stated that the market was not rigged [Tr. R. 187]. Mr. Adkisson, during the time that he dealt with brokers only, made one purchase of stock and that was for the gross amount of $150.00 and consisted of 10,000 shares at 1½¢ per share [Tr. R. 187].

Guy V. Davis was in charge of drilling operations, and all information regarding the progress and production of the wells drilled by Plymouth Oil Company came from him. No one of the three defendants convicted had anything whatsoever to do with the drilling of the wells, the production of the wells, nor was there any showing that they had any access to information except from Mr. Davis and Mr. Siens, and there is no evidence that they had any reason to disbelieve any statements made to them. There is no evidence that they planned to do any illegal acts. The jury, in acquitting Fred V. Gordon and John H. Morgan, stated in substance that either there was no scheme to defraud, or if there was a scheme to defraud, the defendants acquitted were not consciously part of the scheme.

If the jury found this to be true of H. V. Gordon and John H. Morgan, how much truer it would be in the cases of James H. Collins, Sidney Fischgrund and Christopher Schirm. The verdicts are inconsistent.

The Law.

No person can be convicted of using the mails to defraud unless it be shown, beyond a reasonable doubt, that he, *knowingly,* devised a scheme to defraud and that the mails were used in furtherance of it. The offense is one requiring specific intent. Without it, the offense cannot be committed. Because of this, good faith of the accused is a complete defense.

As one court has stated: "The ultimate issue of fact was whether defendants were actuated by an intent to defraud when using the mails." *Sandals v. United States,* 6 Cir., 1914, 213 Fed. 569, 574. In the same opinion we find this language: "A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure, be incapable of committing conscious fraud. Human credulity may include among its victims even the supposed impostor. If the men accused in the instant case realy entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged. As Mr. Justice Brewer said in *Durland v. United States,* 161 U. S. 306, 313, 16 S. Ct. 508, 511 (40 L. Ed. 709):

> " 'The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insists, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident Company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sus-

tained, no matter how visionary might seem the scheme.'

In Rudd v. United States (8 Cir.) 173 F. 912, 913, 97 C. C. A. 462, 463, the scheme to defraud and the circulars sent through the mails to promote it concerned a machine designed as an attachment to a pump for lifting water, which was shown to be contrary to well-known fundamental physical laws.' In respect of the defense of honest belief in the efficiency of the machine, Judge Hook said:

'The main defense was that, though the machine may have been impracticable, the accused honestly believed in its efficiency, and that what he did was without intent to defraud. Of course, if this was so, there was no violation of the law which was designed to prevent the use of the post office in intentional efforts to despoil.' "

See, also *Harrison v. United States,* 6 Cir., 1912, 200, Fed. 662; *Gold v. United States,* 8 Cir., 1929, 36 F. (2d) 16, 32.

To say the least, this case and particularly the convictions resulting from it, is unique. The defendants herein have been found guilty of having been part of a conspiracy to use the mails fraudulently and to violate the Security and Exchange Act. How can there be a scheme to defraud when each and every purchaser of Union Associated Mines Company stock was shown affirmatively to have received stock at a price much less than its real value? The simple arithmetic of the matter, even eliminating the expert testimony adduced, shows that 635,000 shares of hitherto worthless stock was accepted in exchange for a gross 50% overriding royalty in an oil well in a proven oil field. To drill the well cost $40,000.

No cost of the drilling of the well was chargeable against Union Associated Mines Company. The Plymouth Oil Company therefore paid all the expenses of drilling the well, paid all of the land-owner's royalty, paid all of the operating expenses of the well after production was obtained, and retained for itself a participating interest far less than the interest assigned to the Union Associated Mines Company.

If it cost $40,000 to drill the well, then certainly the 635,000 shares would be worth at least $20,000.00, which is in excess of 3¢ per share, and when one takes into consideration that in addition to the cost of drilling, the Plymouth Oil Company had to pay the other expenses, the figure of $20,000 must be raised to where an appraisal of $1200.00 a per cent must be recognized as being a conservative appraisal. If it was worth $1200 a per cent, it means that the Union Associated Mines Company received an asset worth $60,000.00 or approximately 10¢ a share. Where is the fraud? How have people been deprived of their money unlawfully or by false pretense? Merely because of the fact that the hopes of the promoters were not fulfilled does not make the scheme fraudulent, and it might well be said in passing that each and every stockholder who purchased stock on the strength of the Plymouth Oil Company transaction, was offered and did receive, when it was requested, their money back, with interest at the rate of 6% [Tr. R. 163].

The government relied largely upon the testimony of Arthur P. Adkisson. The Government, by offering him

as a witness, represents him as worthy of credit. *Dravo v. Fabel,* 132 U. S. 487, 490. Mr. Adkisson testified that he never did conspire to defraud anyone [Tr. R. 177]. He testified also that "I believed the Union Associated Mines Company had made a wonderful deal," that he thought it was a good deal because it was a most unusual deal. He testified further that the Company was offered for 635,000 shares of its stock, an interest in a well that was being drilled in a proven territory and "assuming that they could get a well without any overhead at all, 50% interest in that well with a settled production of 200 barrels, the way they used to figure these things it would be worth about $1000 a barrel for settled production. In other words, if they had a 100 barrel well with settled production, the price fixed on the well would be $100,000.00" [Tr. R. 180]. He further testified that E. Byron Siens told him that they estimated the initial production was between 300 to 500 barrels. He further testified that Mr. Fischgrund did not tell him that and that no one told him that except Mr. Siens [Tr. R. 185].

The Government, having vouched for Mr. Adkisson, his testimony on its face shows that there was no conspiracy to defraud anyone, but that on the contrary, he and everyone else who went into the transaction, went into it in the highest of good faith, and on the assumption based on actual facts that the deal would be profitable to anyone participating.

When one takes into consideration that everything that the Plymouth Oil Company agreed to do, was done, that two wells were drilled to completion as producers, that the Union Associated Mines Company received everything that it was entitled to receive, that there was no question but that every dollar was properly accounted for, that there was no question that all information coming from the office of Union Associated Mines Company to its stockholders was true, it is hard to understand how a judgment of conviction is justified.

The crime of "conspiracy" consists in combining or confederating of two or more persons for purpose of committing a public offense. It is distinct from the offense intended to be accomplished as a result of a conspiracy, and is complete upon the forming of a criminal agreement and the performing of at least one overt act in furtherance of an unlawful design. *Weniger v. U. S.,* 47 F. (2d) 692. In other words, there must be both an unlawful agreement and an act to effect the object of it. *Ferracane v. U. S.,* 29 F. (2d) 691. Wherein, in all of the testimony adduced, is there any evidence of one single act that can properly be termed unlawful? There is no evidence of any unlawful act or intent to violate the Mail Fraud Statute, nor is there any evidence of any intention to violate the Security and Exchange Act. On the other hand, there is every evidence that whatever participation the defendants had in the transaction, was honest, and that their every act was legal.

POINT IV.

Error in Denying Motions for Arrest of Judgment and to Vacate Judgments of Conviction Notwithstanding the Verdicts.

Under this heading we purpose to discuss the Assignment of Errors VII and VIII [Supp. Tr. pp. 603, 604] reading as follows:

"VII.

"The District Court erred in denying the motions made by the said defendants after the jury had returned its verdicts in the above entitled cause, for an order arresting the judgments on Count XI in said indictment.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that said Count XI in said indictment does not state facts sufficient to constitute a punishable offense or any offense or crimes against the laws, or any law, or against the constitution of the United States, and particularly said Count XI does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code.

VIII.

Said District Court erred in denying their Motions to Vacate the Judgment of Conviction and Discharge the Defendants Notwithstanding the Verdicts.

The grounds of said motions were and the grounds of said errors in denying said motions were, and are, that the verdicts of the jury finding them guilty as charged in Count XI of the indictment, were and are contrary to law and not supported by the law and the facts involved in these proceedings."

The motions particularly referred to in these Assignment of Errors are as follows:

"MOTION FOR ARREST OF JUDGMENT.

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, and jointly and separately move the court to refrain from entering a judgment against any of them based upon the verdict rendered in this case, upon the following grounds:

1. That the Eleventh Count in said indictment does not state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or any law or against the Constitution of the United States of America, and particularly said Eleventh Count does not state facts sufficient to constitute a violation of Section 88, Title 18, United States Code." [Pr. R. 96.]

"MOTION TO VACATE THE JUDGMENT OF CONVICTION AND TO DISCHARGE THE DEFENDANTS NOTWITHSTANDING THE VERDICT.

Come now the defendants, James H. Collins, Sidney Fischgrund, and Christopher E. Schirm, and jointly and separately move the court to vacate and set aside the judgment of conviction herein and to discharge the defendants and each of them, notwithstanding the verdict.

That this motion is made upon the records and files herein and upon the transcript of the proceedings on the trial of this action and upon the exhibits offered and received herein, which transcript and exhibits are hereby referred to and relied upon by the said defendants. Said motion is made upon the following grounds and each of them:

> 1. That the verdict of the jury finding the said defendants and each of them guilty as charged in the Eleventh Count of the indictment herein, was and is contrary to law and not supported by the law and the facts involved in these proceedings." [Pr. R. 92, 93.]

These appellants were acquitted on all of the substantive counts, and convicted on the conspiracy count alone. By the jury's verdicts, Mr. Gordon and Mr. Morgan were acquitted on *all* counts, including the conspiracy count. It must be held, therefore, that whatever conspiracy existed, existed only between all or some of the following persons: Messrs. Siens, Barclay, Adkisson, Davis (none of whom was indicted), Collins, Fischgrund or Schirm.

These appellants were charged in the Eleventh Count with the conspiracy denounced under Title 18, U. S. C. Sec. 88, Sec. 37, Penal Code, which reads:

> "If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such parties do any action to effect the object of the conspiracy . . ."

they shall be guilty of an offense.

The conspiracy charged here is one to

> "Violate Section 17(a)(1) of Securities Act of 1933 (Section 77q(a)(1), Title 15 U. S. C.) and Section 215 of the Criminal Code of the United States (Section 338, Title 18, U. S. C.)" [Tr. R. 33.]

Obviously, in the case at bar, there can be no violation of Section 17(a)(1) of the Securities Act unless there is a "sale," as defined in the Securities Act, of a

security "by the use of the mails," and the employment of the device, scheme, or artifice to defraud as it is described in the indictment. This, because Section 71q(a)(1) provides, insofar as it is material here, as follows:

> (a) It shall be unlawful for any person in the sale of any securities . . . by the use of the mails, directly or indirectly —
>
> (1) To employ any device, scheme, or artifice to defraud . . ."

It is also obvious that in this case there can be no violation of Section 215 of the Criminal Code (the Mail Fraud Statute) unless the mails were actually used "for the purpose of executing such scheme or artifice or attempting so to do." It is clear, therefore, that before any of these appellants could properly be found guilty of conspiracy, to violate those statutes, it must be shown that such appellant knowingly joined a conspiracy formed for the specific purpose of utilizing the mails either in violation of the Securities Act, or in violation of the Mail Fraud Statute, or both. It is not sufficient to show that a scheme to defraud was formed and that mails were in fact *later* used to carry it into effect or to make a sale of securities; it must be specifically alleged and proven that in joining the conspiracy, the particular appellant actually *intended* to violate those laws *by the actual use of the mails.* This is very clear.

In *Farmer v. U. S.* (C. C. A. 2), 223 Fed. 903, it is said:

> "Count 1 charged a conspiracy (section 37) to commit a violation of that section (215). Under the first count, therefore, the government had to sustain a heavier burden of proof as to the *intent* of the conspirators than under the other two. Under 215 it is sufficient to show an intent on the part of the deviser or devisers of the scheme to defraud some one; it is no longer necessary to show an intent to use the mails to effect the scheme, as it was under section 5480, U. S. Rev. Stat. The deviser of the scheme may, at the time he planned it, have intended to avoid all use of the mails in carrying it out; nevertheless if, in carrying it out, he does use the mails, the offense is committed . . . *When, however, the charge is conspiracy to commit the offense specified in section 215, it is necessary to prove an intent, not only to defraud, but also to defraud by the use of the mails.*" (Emphasis supplied.)

See also: *Burns v. United States,* (C. C. A. 8), 279 Fed. 982.

In *Morris v. United States* (C. C. A. 8), 7 F. (2d) 785, the court had under consideration an indictment containing 18 counts charging violations of Section 215, and one count charging conspiracy to violate the Mail Fraud Statute. The court said:

> "Where the charge, however, is conspiracy under section 37 of the Criminal Code to violate section 215, *the intended use of the mails is a substantial element of the offense.* A conviction cannot be sustained without proof of the same . . . The govern-

> ment carries a heavier burden where it seeks a conviction under section 37 for a conspiracy to violate section 215 than where it seeks merely conviction for the violation of said section 215 because it must prove an intent on the part of the conspirator to use the mails in carrying out the scheme." (Emphasis supplied.)

With these principles of law — now very well established — in mind, let us consider the allegations of this particular Indictment. The "scheme and artifice" was described in substance in the first count of the Indictment. It is nowhere alleged in that first count that such "scheme and artifice" contemplated the use of the mails. It is true that the Indictment alleges that —

> "It was further a part of said scheme and artifice that the defendants would print, edit and prepare and cause to be printed, edited and prepared, bulletins, circulars, letters, notices, and other literature, all of which would contain false and misleading statements as hereinbelow described, and which would be disseminated and transmitted to the persons to be defrauded and to the public generally *by the defendants, their agents and employees, . . .*" [Tr. R. 7.] (Emphasis supplied.)

and further alleged —

> "It was further a part of said scheme and artifice that the defendants would, be for the purpose of inducing and causing the persons to be defrauded to part with their money and property, and to purchase shares of stock of the 'corporation,' make and cause to be made the following false, fraudulent and untrue representations, promises and statements to the

> persons to be defrauded, by means of oral communications and by means of written communications, circulars, bulletins, letters, telegrams, and newspaper advertisements, . . ." [Tr. R. 7.]

We repeat: There is no allegation in the substantive counts of the Indictment that it was the intent of the defendants as part of the scheme to use the mails.

In the eleventh count, which is the Conspiracy Count and the only count upon which these appellants were convicted, it is alleged that these appellants and the other defendants, Fred V. Gordon and John H. Morgan, who were acquitted, conspired —

> ". . . with E. Byron Siens, J. A. Barclay, Arthur P. Adkisson and Guy B. Davis, not named herein as defendants, . . . to commit certain offenses against the United States, to wit, to wilfully violate Section 17(a)(1) of Securities Act of 1933 (Section 77q(a)(1), Title 15 U. S. C.) and Section 215 of the Criminal Code of the United States (Section 338, Title 18, U. S. C.), and among such violations to commit the divers offenses charged against the said defendants in the First to Tenth Counts, inclusive, of this indictment, the allegations of which Counts, descriptive of the said defendants in the sale of the common stock of Union Associated Mines Company by the use of the United States mails, employing a scheme and artifice to defraud, and of the connections of said defendants therewith, and descriptive of the defendants' use of the United States mails in furtherance of the said scheme as they had devised it, are hereby incorporated by reference to said First to Tenth Counts, . . ." [Tr. R. 33 and 34.]

We earnestly contend that this is not a sufficient allegation that these appellants formed a conspiracy which contemplated the use of the mails.

The inclusion of this Indictment of the section numbers of the Statutes, which it is claimed these appellants conspired to violate, "form no part of the Indictment, and neither add to nor take from the legal effect of the charge." *United States v. Nixon,* 235 U. S. 231, 235.

In *Taylor v. United States,* 2 F. (2d) 444, at 446, the Circuit Court of Appeals for the Seventh Circuit states:

> "The indictment is a pleading. Its sufficiency must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of section 135 of the Criminal Code or of section 1014 of the Revised Statutes of the United States neither adds to nor detracts from the allegations which alone must measure the sufficiency of such pleading."

These deficiencies in this Indictment as to the allegations of the conspiracy cannot be supplied by the following language from the Indictment [Tr. R. 34] that—

> ". . . each and all of the said acts of each and all of the defendants so described in said first to tenth counts, inclusive, of this indictment are now here designated as overt acts of said defendants, done in pursuance of and to effect the objects of said conspiracy, . . ."

In *United States v. Britton, et al.,* 108 U. S. 199; 27 Law ed. 698, it is stated:

> "The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the

> object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae,* so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

However, quite apart from the defects in this eleventh count, and particularly in face of the fact that Mr. Morgan and Mr. Gordon, the other two indicted co-conspirators, were acquitted on all counts in the Indictment, the language hereafter quoted might well be applied so far as these appellants are concerned.

From *Farmer v. United States* (C. C. A. 2), 223 Fed. 903, in which count one of the Indictment charged a conspiracy to commit a violation of the Mail Fraud Statute, and the Court said:

> "We do not find in this record sufficient to warrant the inference that on January 2, 1910, when the conspiracy was formed, the conspirators intended to use the mails . . . Since inference is not enough to make out full intent under count 1, and there is no direct evidence of it, we think conviction under this count should be reversed."

In *Schwartzberg v. United States* (C. C. A. 2), 241 Fed. 348, it is declared "that an inspection of the record does not justify the finding necessary to sustain the conspiracy count, viz.: that there was an intent on the part of the conspirators to use the mails in the execution of the scheme."

In a dissenting opinion in *Burns v. United States,* (C. C. A. 8), 279 Fed. 982, Judge Sanborne uses this interesting language:

> ". . . this is a prosecution for the offense of forming the conspiracy denounced by section 37 of the Criminal Code to misuse the mails to commit the offense denounced by section 215 and it was indispensable to the conviction of the defendant Burns of this offense that there should be substantial proof that when he participated in the formation of or joined the conspiracy he had the criminal intent that the mails should be used to execute it. Such an intent, it is held, may be inferred from the fact that the conspiracy is impossible of execution without the use of the mails but that it is not lawfully inferrable from the fact that other members of this conspiracy used them in effecting the scheme to defraud. In other words, one may join in a scheme or artifice to defraud and yet stop short of intending to use the mails for that purpose, and in such a case he is not guilty of the conspiracy denounced by section 37 . . ."

Merely because these appellants were convicted under the Conspiracy Count, the convictions should not be sustained on less evidence than would be required to sustain a conviction on a substantive count.

In *People v. Rodriguez,* 37 Cal. App. (2d) 290, 294, Mr. Justice Doran said:

> "It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely charging conspiracy. Relatively the same quantity and quality of evidence is necessary to support a judgment of conviction of the offense of conspiracy as of any other offense. Moreover, the same rules of evidence apply generally."

Under the law and facts above mentioned, the motions for arrest of judgment and to vacate the judgments of convictions should have been granted.

> *Bond v. Dustin,* 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835;
>
> *Banta, et al. v. United States,* (C. C. A. 9), 12 F. (2d) 765, 766;
>
> *Crank v. United States,* (C. C. A. 9), 61 F. (2d) 620.

POINT V.

Error in Admitting in Evidence Government Exhibit No 6, the Minutes of Union Associated Mines Company.

Under this heading we propose to discuss the Assignment of Error IX [Supp. Tr. pp. 604, 605], reading as follows:

> "Said District Court erred in overruling the objections of said defendants to the admission in evidence, and admitting in evidence Government Exhibit No. 6, the minutes of Union Associated Mines Company which were identified by the witness Truman. The grounds of the objections and the exceptions were as follows:
>
> 'Mr. Blue: If the Court please, I have no objection so far as the foundation is concerned except that on behalf of the other defendants I object to the minutes as set forth on the ground it is hearsay as to them, and there is no foundation as yet laid as to in any way connect any of the defendants with the preparation of these minutes, and I therefore urge that objection to them.
>
> Mr. Evans: Do I understand you correctly, Mr. Blue, that you are stipulating on behalf of all of the other defendants that the —
>
> Mr. Blue: They are the minutes. There is no question about that.
>
> Mr. Evans: — Union Associated Mines Company and may be introduced subject to their objection as to their competency and relevancy and materiality?
>
> Mr. Blue: And it is definitely hearsay as far as the other defendants (except Morgan) are concerned.
>
> The Court: All right. They may be received.
>
> Mr. Blue: Exception.' "

There is not the slightest bit of evidence in the entire record that any of these appellants ever saw or even heard of the minutes of Union Associated Mines Company. None of these appellants had anything whatever to do with the preparation of those minutes. By what rule they could be offered or received in evidence is impossible for us to understand. Mr. Zell Truman was on the witness stand for the Government at the time the minutes were offered and received in evidence [Tr. R. 136].

POINT VI.

Error in Admitting in Evidence Testimony From the Witness Harold V. Dodd as to Oil Production in the Devil's Den Area in California.

Under this heading we propose to discuss the Assignment of Error X [Supp. Tr. pp. 605, 606, 607], reading as follows:

> "Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Harold V. Dodd, as to the oil production in the Devil's Den area in California, the grounds of the objections and the exceptions being as follows:
>
> By Mr. Manster:
>
> What is known generally as the Devil's Den area embraces about two or three townships and embraces 12 to 18 sections, a section being 640 acres [Tr. 665]. At any time during 1938 the highest number of wells producing in that area was 20.
>
> Q. Can you tell us what was the total amount of barrel production from those 20 wells?

Mr. Cannon: I will object to that as being immaterial altogether. [Tr. 666.]

* * * * * * * *

The Court: Well, what we are primarily interested in is the value of these 40 acres, and all you attempt to show first by the witness is that this well has been drilled within three-quarters of a mile away.

Mr. Manster: That is right.

The Court: And therefore we were to draw whatever inference we could from that as to the value of this land, and subsequently, on cross examination, the witness said that it wouldn't make any difference.

Mr. Manster: We contend that is some indication of the probability of finding oil. If a dry hole is drilled within three-quarters of a mile in a particular area, we contend it is some indication as to whether or not oil in productive quantities would be produced.

Now, it has been brought out here that certain areas, certain acreage in the Devil's Den area have produced oil, and we would like to show just what the production was in 1938 and 1939.

Mr. Cannon: Then I will add to my objection heretofore given that this is an attempt to impeach his own witness.

Mr. Manster: No, I am not impeaching him at all, I am merely asking for his records.

The Court: Go ahead.

Mr. Cannon: Exception.

The Witness: 9,094 barrels." [Tr. 667-668.]

Nothing much could be added to the Assignment of Error itself in support of our contention that the evidence was improperly admitted.

It was the contention of the prosecution that the Devil's Den lease was transferred from Mr. Gordon and his wife and others to one Millener on December 29, 1938, and that Mr. Millener on January 5, 1939, leased the particular property or assigned his interest in that lease to Union Associated Mines Company in return for a block of 235,000 shares [Tr. R. 329]. The Government contended that as of December 29, 1938, a dry hole had been drilled three-quarters of a mile south of the land covered by the lease in question [Tr. R. 330], but the prosecution also admitted that none of the defendants other than Mr. Gordon had anything whatever to do with the spudding in of the well [Tr. R. 331]. No evidence was offered or received showing or even tending to show that any of the defendants, including these appellants ever knew anything about the drilling of that dry hole or as to the production of oil in the Devil's Den area, and under those circumstances the evidence offered and received through Mr. Dodd was highly prejudicial and was hearsay, certainly as to these appellants.

Under such circumstances, it could not possibly he held that any such testimony as given by Mr. Dodd would be proper in attempting to prove that these appellants did "assign and cause to be leased and assigned, unproven and undeveloped property claimed by defendants to be of value to said 'corporation,' and secure for themselves from said 'corporation' 235,000 shares of the stock of said corporation," [Tr. R. 5, 6], as the indictment charges.

POINT VII.

Error in Admitting in Evidence the Testimony of the Witness Paul Julian Howard as to the Assessed Value of This So-Called Devil's Den Land.

Under this heading we propose to discuss Assignment of Error XI, [Supp. Tr. pp. 607, 608, 609] reading as follows:

> "That said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Paul Julian Howard, as to the assessed value of certain land in Kern County, California. The grounds of objections and the exceptions were as follows:
>
> Q. Now in pursuance of your official duties, did you make a valuation of the oil and mineral rights of that tract known as the northeast one-quarter of the northwest one-quarter, Section 2, township 25, south range 18-E in Kern County, California?
>
> Mr. Cannon: I will object to that as being immaterial, and no foundation having been laid.
>
> Mr. Manster: I am limiting it to 1939 at the time.
>
> Mr. Cannon: I will object, then, on the further ground —
>
> Mr. Manster: I beg your pardon. It is 1938.
>
> Mr. Cannon: I will object, then, on the further ground that there is no issue in the indictment towards which this testimony would have the slightest probative value. We are not charged with selling land for something more than it was worth, nor making any false representations to any person as to its value. It is not part of the scheme alleged. [Tr. 728-729.]

Mr. Manster: We maintain it is material on the allegations of the indictment which states that these defendants leased and assigned unproven and undeveloped properties.

Mr. Cannon: It does not go to the value. It goes to the proven or unproven.

Mr. Manster: We maintain, Judge, that the valuation of oil and mineral rights placed by the responsible State official who is charged with that function, is extremely relevant and material on the issue of whether this particular tract was proven and developed or not.

Mr. Blue: May I say something? Pardon me, Mr. Cannon. There is no witness that has appeared to justify any assumption that there was any representation made that this land was proven and/or developed.

Mr. Cannon: That isn't the point that I am making now.

The Court: That isn't the point. [Tr. *729.*]

* * * * * * * * *

Mr. Cannon: The point I am making now, Mr. Blue, is that there is no allegation here with respect to any part of the scheme having anything to do with the value of the land.

The Court: Well, only in connection with whether it was proven or unproven.

Mr. Cannon: I say the assessed value.

The Court: If it were proven, I suppose it would would have a higher assessed value.

Mr. Cannon: Probably.

The Court: You can limit it to what he based his valuation on.

> Mr. Cannon: Of course, I will submit to Your Honor's ruling, but reluctantly, and take an exception, and I would like the objection to stand as to this entire line of questioning covering this tract." [Tr. 729-730.]

What has already been said under the discussion under Point VI on Assignment of Error X, could very largely be repeated here.

But these two additional points might be made so far as this Assignment of Error is concerned:

There is nothing whatever in this Indictment to the effect that the scheme embraced a plan of selling or transferring to any persons any land or lease at a fictitious value, nor was it shown that the witness, Paul Julian Howard, was in any way qualified to pass upon the valuation of the mineral or oil rights on any particular tract of land. Under such circumstances, it would not take any argument to show the prejudicial nature and the damaging effect upon these appellants of the testimony of this witness, set out on page 345 of the Printed Transcript—

> "I did not place any valuation on the mineral or oil rights of that particular tract. As of 1938, I have formed an opinion as to the nature and character of that tract of land with regard to its possibility for the production of oil in commercial quantities, and in my opinion it is unfavorable. In 1939 I did not make an evaluation of the oil and mineral rights of that tract in connection with my official duties; nor did I for the 1938."

POINT VIII.

Error in Admitting in Evidence the Testimony of the Witness Frank L. Tucker and of the Witness Frank Veloz, and in Denying the Appellants' Motion to Strike Government's Exhibits Nos. 50 and 52, and Denying the Motion to Strike the Testimony of the Witness Frank L. Tucker.

Under this heading we purpose to discuss the Assignment of Errors XII, XIII and portions of XIV [Supp. Tr. pp. 609, to 616, incl.] reading as follows:

"XII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank L. Tucker, concerning conversations he had with one Murphy and concerning disposition made by the said witness of certain stock in Union Associated Mines Company. The grounds of the objections and the exceptions were as follows:

Q. And tell me, if you will, the conversation between you and Mr. Murphy with relation to the Union Associated Mines stock.

Mr. Cannon: Objected to, if the Court please, on the ground it is hearsay. It can have no bearing on the issues in the case. May I ask a question on *voir dire?*

The Court: Yes.

Mr. Cannon: Did you ever talk to any of the defendants before you bought any of this stock?

Witness: No, sir.

Mr. Cannon: Or with Mr. Adkisson or Mr. Barclay?

The Witness: No, sir.

Mr. Cannon: I object on the ground it is hearsay, no proper or any foundation is laid for it at this stage of the proceedings.

The Court: He may answer.

Mr. Cannon: Exception. May I have an exception running to it all, if the Court please?

The Court: Yes. [Tr. 869.]

* * * * * * * * *

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased? A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. [Tr. 883.]

* * * * * * * * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes. [Tr. 884-885.]

XIII.

Said District Court erred in overruling the objections of said defendants to the admission in evidence and admitting in evidence the testimony of the plaintiff's witness, Frank Veloz, concerning certain conversations had by the witness with one Murphy. The ground of the objections and the exceptions were as follows:

Q. Tell us what Mr. Murphy told you with relation to the securities of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objections runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken? [Tr. 957-958.]

The Court: Yes.

Mr. Cannon: Thank you.

XIV.

Said District Court erred in denying the motions to strike certain evidence from the record made on behalf of each of the defendants. The grounds of

said motions and the rulings thereon and the exceptions taken thereto were as follows:

* * * * * * * * *

Mr. Cannon: I move to strike Exhibit No. 50 which is a check of Fred L. Hunter (Frank L. Tucker) for $147.50 to R. L. Colburn, it being hearsay as to all the defendants and incompetent, irrelevant, and immaterial, and no proper foundation laid for it.

I can relate the circumstances, if Your Honor is not familiar with them.

The Court: I don't recall that. [Tr. 1072.]

Mr. Cannon: That is the transaction where Mr. Tucker said he had the transaction with Colburn & Company, and that Murphy suggested to him that he place an order through some brokerage, and when he asked him if he had any preference and Tucker said that he had not, the order was placed with Colburn & Company. He made the check payable to Colburn. Murphy is not even an alleged co-conspirator. It would clearly be hearsay as to all these defendants.

The Court: Do you remember where that testimony was?

Mr. Cannon: I can't give you the page, but I can give you the day he testified on it.

Mr. Manster: I have it right here, Judge. The specific testimony with respect to this check is at page 881.

The Court: I will read it.

Mr. Manster: However, the testimony is that it was at Murphy's suggestion that the order for 5,000 shares, for which this check was given, was placed by Murphy with Colburn, and I think Mr. Cannon

stated correctly that Mr. Tucker had no preference for any dealer through whom this transaction should be effected, and he permitted Murphy to select the dealer, and of course, Murphy was connected in this case with Collins in this particular transaction, and with this investor witness through the defendant Collins.

Mr. Cannon: There is no evidence of that. It was not proven. [Tr. 1073.]

The Court: There isn't any evidence of this portion of the stock delivered by Associated to Plymouth, was there, on the open market:

Mr. Manster: No, but the pertinent evidence is this. Page 876 of the transcript:

> "A. Well, Mr. Murphy said there was some stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid 2½ or 2¾ and he asked me if I had any objection to what brokerage firm he put the order in through, and I told him I did not, so, when it was confirmed that — when the sale was confirmed, I gave him the check to deliver to the brokerage firm and he picked up the stock."

The sale was effected at the suggestion of Murphy through the brokerage firms which Murphy selected. [Tr. 1074.]

The Court: Well, I will deny that motion temporarily, but I will look into it.

Mr. Cannon: Exception. May it be deemed that I have made the same motion to strike Exhibit 52 upon the same grounds, it being the R. L. Colburn purchase order.

The Court: That is a part of that same transaction?

Mr. Cannon: Yes.

The Court: The motion will be denied.

Mr. Cannon: Exception.

* * * * * * * *

Mr. Cannon: . . . I move to strike the testimony, all the testimony of the witness Tucker on the ground that it is hearsay as to all of the defendants and no proper or any foundation was made for the introduction in evidence of that testimony, and it is immaterial so far as this case is concerned as it affects the defendants.

I call particular attention to the fact that Mr. Tucker testified specifically that he met Collins after he bought all his stock, and therefore it could have no probative value in the establishing of the scheme or the continuance thereof.

The Court: That motion will be denied."

Nothing could be more forceful in support of the manifest error in admitting the testimony of Frank L. Tucker and in denying the motions to strike that testimony than quotations from the record itself. The court must bear in mind that the witness had never talked to any of the defendants nor had he talked with Mr. Adkisson or Mr. Barclay before he bought his stock [Tr. R. 408]; that he first met Mr. Collins some time after he had bought all of his stock [Tr. R. 410]; that in buying his stock he placed reliance upon the statements made to him by one Murphy, and also on what he saw at the wells [Tr. R. 411] because at the time he bought his stock, he had never talked to any of the defendants and did not know any of them [Tr. R. 411]; that

Mr. Murphy was alone when he called to see this witness and that Murphy called to see him perhaps a dozen times altogether [P. Tr. 409]. Mr. Tucker further testified [Tr. R. 408-411, 415]:

> "Murphy said he had quite a block of Union Associated and was going to sell, and wanted to know if I would be interested in taking 10,000 shares of stock at 3 cents; and that he was going to get it approved by the S. E. C. and that the prices would graduate up, he thought, as it went along. At that time I bought 10,000 shares from him for $300.00. He said they were drilling a well out in Florence. I believe he said they had one well and was drilling on the second one . . . Murphy was alone when he called to see me; he probably called a dozen times altogether. Exhibit No. 49 for identification is a $300.00 check dated 2-14-39, payable to the order of J. H. Collins, and signed by Frank L. Tucker, and bears the endorsement of Collins, paid and charged against the account of mine. This check was given for the 10,000 shares of Union Associated delivered to me by Murphy. The check was made payable to the order of Collins because, Murphy told me, Collins had the contract for the sale of the Union Associated stock and he was working with him and for him, and Murphy asked me to make out the check to Collins. I thereafter received my certificate for 10,000 shares. At the time of this purchase on February 14, 1939, I believed Murphy said that the well was making about 255 barrels per day, and later he told me something about the second Plymouth well. He told me that Gordon, Siens, Lacey, and somebody else were the officials of the Plymouth Oil Company; and said Lacey was furnishing the money for the drilling operations. He told me that Collins' contract was for stocks from about 3 cents to about 26

cents per share; and that under that contract they, he and Collins, had to take about 83,000 shares per month, until the contract was filled. [Tr. 874.] I had not met Collins up to this time. I first met him some time after I had bought all of my stock. It was either in May or June. Government's Exhibit No. 50, a check dated February 20, 1939, drawn by me to R. L. Colburn Company in the amount of $147.50 was delivered to Murphy.

Q. And will you state the occasion for your delivering such a check to him—

Mr. Cannon: Objected to on the ground it is hearsay.

The Court: He may answer.

Mr. Cannon: Exception. Go ahead. [Tr. 876] [Pr. R. 410].

(Witness continuing)

Murphy said there was stock in Salt Lake that they wanted to pick up and he would rather pick it up through some brokerage firm, and suggested that I bid 2½ or 2¾, and asked if I had any objection to what brokerage he put the order in through, and I told him I did not. So, when the order was confirmed, I gave him a check to deliver to the brokerage firm that he had picked out. I did not pick out R. L. Colburn Company. Murphy delivered the confirmation to me and I thereupon issued my check, Exhibit 50. I bought 5,000 shares through Colburn Company. Government's Exhibit No. 51 appears to be a duplicate deposit slip on the Bank of America bearing the date of February 28, 1939, and states, 'Certified Check, $1650.' I got this certified check to pay for stock of the Union Associated. Murphy came to see me and said they lacked 55,000 shares of having the stock picked up for that month, and I

gave him a check, payable to Siens, for this 55,000 shares . . . Government's Exhibit No. 52 is a confirmation upon the stationery of R. L. Colburn & Company for 5,000 shares of Union Associated at $147.50, under date of February 20, 1939. I received it by mail. In buying this stock *I placed reliance upon statements made to me by Murphy and also on what I saw of the wells. I did not place reliance upon statements made by any of the defendants in this case, because I had never talked to any of them, and I did not know any of them* . . .

Mr. Evans: Your Honor, at this time I wish to offer in evidence Government's Exhibits 49, 50 and 51 and 52.

Mr. Cannon: I will object on the ground that they have no bearing on the issues in this case at all, particularly in view of the last few statements made by this witness that he never talked to any of the defendants and never relied on any representations made by any of the defendants in the purchase of the stock.

The Court: All except Murphy.

Mr. Cannon. He is not a defendant. I said the defendants.

The Court: Objection overruled.

Mr. Cannon: Exception.

(The documents referred to were marked Plaintiff's Exhibits Nos. 49, 50, 51 and 52, and were received in evidence.)

Q. By Mr. Evans: Mr. Tucker, do you still have the stock of Union Associated Mines Company which you purchased? A. No, sir.

Q. What did you do with it?

Mr. Cannon: I will object to that as being immaterial.

The Court: He may answer.

The Witness: I took a note from the Plymouth Oil Company. [Tr. 883.]

* * * * * * * *

Mr. Cannon: I will move to strike the testimony of this witness heretofore given with respect to what happened to the stock. It is long after the date laid in this indictment, May 1, 1941.

The Court: It may stand.

Mr. Cannon: It may stand?

The Court: Yes.

Mr. Cannon: Exception. May I add to that objection, and may it be deemed to have been made before the ruling, that it is hearsay as to all the defendants?

The Court: Yes.

* * * * * * * *

Mr. Cannon: I move to strike all the testimony of this witness on the ground that it has no probative value in that it is wholly incompetent, irrelevant, immaterial and hearsay as against all of these defendants, no reliance having been placed by this witness upon any representations made by any of the defendants, and it further appearing that no representations of any kind were ever made by any one of these defendants to this witness.

I think that covers the suggestion made by Mr. Blue that I add to it, if I haven't already done so, that it is hearsay, because it doesn't appear that Mr. Murphy was ever authorized to speak for any of the defendants, nor does it appear that any of the defendants knew of any of the representations made.

The Court: The motion will be denied in so far as the testimony goes to the surrender of the stock.

* * * * * * * *

(Witness continuing)

A. . . . so I bought that stock at the contract price in the Murphy contract, and paid the money over to Mr. Siens, with whom Murphy had his agreement. I bought this stock as a speculation, pure and simple, and I put in, I think, $2,445.00 altogether. [Tr. 891.]" [Tr. R. 408, 409, 410, 411, 412, 413, 414 and 415.] (Emphasis supplied.)

All of this testimony given by Mr. Murphy was clearly hearsay as against all of the defendants. It was highly prejudicial because it related to matters specifically referred to in the Indictment as being the false representations which these appellants were charged with having made. To attempt to establish such representations by this hearsay evidence is manifestly prejudicial.

The Printed Record itself is the strongest possible argument that can be made to establish the error of the court in admitting in evidence the testimony of the witness Frank Veloz. We quote from that record at the point where Mr. Veloz was under examination:

"My name is Frank Veloz . . . I know James Collins very slightly but prior to the purchase of that stock I had not known Collins. I had met him once at the Ambassador Hotel. I had known Joseph Murphy about 12 to 15 years, and I had a conversation with him with respect to the Union Associated Mines and the Plymouth Company, the first conversation being in the early part of 1939.

Q. Tell us what Mr. Murphy told you with relation to the securities of the Union Associated Mines Company?

Mr. Cannon: Pardon me just a minute, Mr. Veloz.

The Witness: Yes.

Mr. Cannon: If the Court please, I make an objection to this testimony on the ground it is hearsay as far as Mr. Collins is concerned, whom I represent, and also it is hearsay as to all the other defendants in this case, and I object on that ground.

The Court: Very well. Overruled.

Mr. Cannon: May I have an exception?

The Court: Yes.

Mr. Cannon: And may I have an understanding that the objection runs throughout the testimony of this witness with respect to the stock and also all other matters as being hearsay, and an exception taken?

The Court: Yes.

Mr. Cannon: Thank you. [Tr. 957-958.]

(Witness continuing):

Murphy was a good friend of mine and he told me he was associated in this particular proposition; that the chap involved did not have sufficient money to keep a contract which he had to purchase a certain amount of stock each month, and mentioned Collins' name. Murphy said that Collins had to purchase so many shares each month, and that he and Murphy didn't have sufficient cash so they needed $1,000 to meet the obligation, and he told me that if I would let them have the $1,000, he would pay it back in ten days or give me 25,000 shares of stock. I received that stock, but I did not receive back the $1,000. I was a little bit confused as to the wells that were drilled, but it was said that they had a couple of wells already producing, and they were going to drill another one, and the stock was supposed to go on the Exchange. I think it was said that a few hundred gallons, that is from 1 to 300 gallons or

barrels were being produced. Murphy told me that the stock in a few days was going on the Salt Lake Stock Exchange, and it was gong on at a higher price than I paid for it, and that he was going to dispose of some of the stock that he had and pay me back the $1,000, or if I wanted to keep the stock, I could do that and make a profit on it. He said the stock would go on the Exchange around 6 cents. I do not recall ever meeting Barclay, president of the Salt Lake Exchange. Collins and Murphy had $1,200 when they were in the lobby of the Ambassador Hotel, and I drew a check for $1,000 and went into the branch bank in the Ambassador and the bank gave them a check for $2,200. Only once did Collins participate in any of the conversations I had with Murphy, and that was in the lobby of the hotel. Collins merely corroborated Murphy's statements.

Mr. Cannon: I will move to strike that out.

The Court: Oh, let it stand.

Mr. Cannon: Exception. [Tr. 961.]" [Tr. R. 445, 446 and 447.]

The mere statement that Collins "corroborated Murphy's statements," in the face of the motion to strike, means nothing, and particularly in view of the later testimony of this same witness where he says:

> "Prior to the conversation that I had with Murphy and Collins in the lobby of the Ambassador Hotel, I had already made arrangements with Murphy to buy this stock or to lend him the $1,000, *even before Collins ever came there. The representations that were made by Murphy concerning the listing of the stock, the drilling of the wells, and the production of the wells, were all told to me before I ever met Collins; and I agreed to let Murphy have this $1,000 upon those representations, because of my friendship for Murphy.*" [Tr. R. 447, 448.] (Emphasis supplied.)

POINT IX.

Error in Denying Motion to Strike Certain Documentary Evidence and Oral Testimony.

Under this heading we purpose to discuss the following portions of Assignment of Error XIV, reading as follows [Supp. Tr. pp. 604, 605]:

> "Said District Court erred in denying the motions to strike certain evidence from the record made on behalf of each of the defendants. The grounds of said motions and the rulings thereon and the exceptions taken thereto were as follows:
>
> Mr. Cannon: If the Court please, at this time I want to make some special motions to strike, if I may have the Clerk's list of exhibits?
>
> First, I want to move to strike on behalf of all defendants, to strike from the record Exhibit 41 in evidence, copies of a log of an oil or gas well, Division of Oil and Gas, on the ground that no proper or any foundation has been laid for the introduction in evidence of that document; on the further ground that on its face alone it shows to be incompetent, and on the further ground that it is a narrative of past events.
>
> They are copies, not the originals. No witness was produced to identify them except the fact that they got them from Plymouth Oil office. They are dated September 26, 1939, purporting to set up what occurred on December 14, 1938 [Tr. 1069].
>
> They are not signed by any witnesses produced. One of them bears no signature, typewritten or otherwise, and the other one, attached to the sheet, is dated June 20, 1939, purporting to reflect what occurred on February 28, 1939. [Tr. 1070.]

Do you want to rule on them separately, or shall I make them all at one time? May I pass this to the bench? It is hearsay as to all the defendants.

The Court: There is one that bears the signature of Mr. Lacy.

Mr. Cannon: But the signature has never been identified. The witness was never produced. No person was offered as a witness to testify as to the regularity of the keeping of the document or the circumstance under which it was prepared, or where the original was filed.

I insist on all of them, but the primary objection is that it purports to be a narrative of past events.

The Court: I will deny your motion.

Mr. Cannon: Exception. I move at this time to strike Exhibit No. 27, which is a check No. 191, dated January 7, 1939, given to John McEvoy for $100, signed by Mathilda M. Klinger, and also Exhibit No. 28, a check of March 1, 1939, given to Mr. McEvoy for $20, signed by Mathilda Klinger, and Exhibit 29, certain stock certificates of Union Associated Mines Company, being stock certificates delivered to Mathilda M. Klinger on the ground that each and all of those exhibits are hearsay as to these defendants, and to all of them, there being no connection shown with those checks, receipt of the money for the stock, or delivery of the stock by any of the defendants to that witness.

The Court: Your motion will be denied.

Mr. Cannon: Exception.

* * * * * * * *

Mr. Cannon: I move to strike the testimony, all the testimony of the witnesses Klinger and Walker on the ground that there is, so far as defendants Collins and Morgan are concerned, and Mr. Fischgrund

and Mr. Schirm on the ground that the testimony is altogether hearsay as to them, it not appearing that they had any connection with the transaction at all and were not present at conversations [Tr. 1075] had or representations made at any of these conversations, and if that motion may be deemed to be made without referring to the book and page of the transcript, because I don't have the transcript, and I can't do it.

The Court: That motion will be denied.

Mr. Cannon: Exception.

* * * * * * * *

Mr. Cannon: . . . I will move on behalf of all defendants to strike the testimony of the witness Shomate on the ground that so far as all defendants are concerned, that it embraces the transaction, has to do with the transaction which is in no way mentioned in the indictment. There is no charge in this indictment to the effect that we would assume to convey property to which there was no title to any of the persons. [Tr. 1076.]

I assume the only purpose of the testimony of Mr. Shomate was interrogation of the witness by the prosecution, indicating that he was directed toward establishing the lack of record titles in Gordon at the time he made the Millener lease, and that not having charged the defendants in the indictment whatever, it becomes immaterial and irrelevant. It has no bearing on the issues in this case and is highly prejudicial.

I make that motion on behalf of all defendants for that reason, and I make it further on behalf of all defendants except Gordon, on the ground that the transaction is entirely hearsay, and as to the rest of the defendants, it is also highly prejudicial.

In view of the fact that I don't want this Court or the Appellate Court to feel that I haven't called to the Court's attention the details of the transaction, if your Honor wants me to refresh your recollection as to the testimony, I will be glad to do that.

The Court: It was the testimony of the County Recorder, wasn't it?

Mr. Cannon: Yes, the County Recorder. He testified on the afternoon of July 13.

The Court: I will reserve my ruling on that. [Tr. 1077.]

* * * * * * * *

The Court: The motions submitted to the Court yesterday are denied. That includes the motion to strike the testimony by Mr. Shomate.

Mr. Cannon: May we have an exception to them? Also I understand, just so the record will be clear, that the motions were also directed to the dismissal of each and every count separately, and to the indictment as a whole?

The Court: Yes, that would be included [Tr. 1163]."

Here again mere quotations from the record itself show the error in admitting the evidence. It is highly prejudicial.

Exhibit 41 is set out in the printed transcript at page 451, and in view of the allegations of the Indictment, among others to the effect that the defendants would falsely represent the production of oil received from Plymouth Oil Company well No. 1 [see Indictment, paragraphs Nos. (3), (4), (6), (7), and (9), Tr. R. 8, 9, 10], the introduction of this exhibit was very prejudicial, particularly since there was absolutely no founda-

tion to connect it with any of the defendants. As disclosed by the Printed Record, the witness Mathilda M. Klinger and Grace T. Walker is as follows:

> "My name is Mathilda M. Klinger and I live in Pasadena. * * * I first heard of Union Associated through Miss McLane and purchased stock in that company through Miss Walker. Our first purchase was in October, 1938. * * * We bought 40,000 shares and paid $1,500.00 for it by cashier's check delivered to Mr. Adkisson. Miss McLane brought Mr. Adkisson down and introduced me to him as Mr. Gordon's secretary, and I delivered the $1,500.00 check to Mr. Adkisson * * *" [Tr. R. 315].
>
> * * * * * * * *
>
> "After the initial purchase, we purchased some more stock through John McEvoy, in January, 1939. Miss Davis and I had a conversation with him in Pasadena.
>
> Q. What, if anything, was said by Mr. McEvoy to you with relation to the Union Associated Mines Company or the Plymouth Oil Company?
>
> Mr Blue: If the Court please, I will object on the ground that it calls for hearsay. It is incompetent. The only evidence being here that Mr. McEvoy when he called on people, acted as an independent contractor. These defendants are not bound by anything that he did.
>
> The Court: You may answer.
>
> Mr. Blue: Exception. And, if the Court please, without the necessity of restating the objection, it is understood as to all conversations this witness had with Mr. McEvoy and that the same objection will be understood to have been made, the objection

overruled, and exception noted. [Tr. 599.] [Tr. R. 315.]

(Witness continuing):

McEvoy said that the first well had been drilled and it was coming in at the rate of about 200 barrels a day; that they were selling it at about $1.05 per barrel to the Standard Oil Company, and that they were making good money and they hoped soon to drill another well; that the Plymouth Oil Company were drilling the well on a 50-50 basis with the Union Associated Mines, with Plymouth Oil Company paying the expenses of drilling. McEvoy said that the Union Associated Mines Company was earning 2½ cents a share and there were 1,400,000 shares of common stock outstanding, no other indebtedness; and that they were going to drill another well which, if it was successful, should bring in just as much oil as the other well did. McEvoy said that they were hoping to get the stock relisted on the Stock Exchange, and that they had [90] made an application, and hoped within a week or ten days to have it relisted; that it had been listed at one time and had been retired because the mine was idle. I do not know how many conversations I had with McEvoy, but I know he called several times and I talked to him on the telephone several times. He called to sell more stock. After he called to say that the second well had been drilled, and that it was producing about 300 barrels a day, he said that as soon as the stock was listed on the Exchange it would probably go to 50 cents a share, and that the Plymouth Oil Company was interested in it because of the investment and they would do what they could to help push the stock up. He said Plymouth Oil Company had an investment of about $30,000.00 in the well. I made another purchase of 3,000 shares

in two lots, 2,500 shares in January and 500 shares in March [Tr. 603] at 4 cents, all from Mr. McEvoy. Miss Davis purchased 1,000 shares and Miss Walker purchase 15,000 shares, all at 4 cents a share." [Tr. R. 316.]

At this point, Exhibits 27, 28 and 29 were offered and received in evidence under Stipulation, as follows:

* * * * * * * *

"Mr. Blue: * * * The same stipulation, subject, of course, to the running objection as to hearsay as to all these transac- [91] tions with McEvoy. [Tr. 605.]

* * * * * * * *

In March, 1939, I received the certificates for the first purchase that I made in this stock. I do not have those certificates now because in April they were returned to Mr. Gordon for the return of the money paid for them which was $1,500.00, and that covered the stock purchased by the 4 ladies.

* * * * * * * *

(Witness continuing):

I met Mr. Adkisson and Mr. McEvoy but not Mr. Siens and I do not recall having met Gordon, Fischgrund or Schirm, but I met Collins one time. He came with McEvoy, but did not sell me anything. The last time I bought I gave McEvoy a $20.00 check for 500 shares at 4 cents a share. I was taking a flyer to make it an even 3,000 shares. I knew that when I purchased stock in an oil venture that it was a gamble. When I first bought stock and put $150.00 in it and gave that money to Adkisson, Adkisson did not tell me anything about it. I got my information from Miss McLean. [Tr. 612.] When

I bought this stock first, I knew that I had a guarantee from Gordon that if I wanted my money back I could get it; but I did not get any guarantees from McEvoy. When I requested Gordon to repay the money, I received it in the form of a cashier's check.

* * * * * * * *

So far as any transaction that I had with Gordon was concerned, personally, all I had to do was to ask him for the money and I got it back. I did not tell him that any one had made any misrepresentations to me. I do not recall that either Mr. Gordon or Mr. Adkisson told me anything personally, when I purchased this stock from Gordon.

* * * * * * * *

Recross-Examination

By Mr. Blue:

I was just introduced to Collins." [Tr. R. 319.]

The prosecution witness, Grace T. Walker, testified on direct examination as follows [Tr. R. pp. 320 to 321]:

"By Mr. Evans:

* * * I did not see Gordon when the stock was offered to us because I was not in town. I met John McEvoy twice, once in Pasadena and the other in Santa Monica. I had a conversation with him.

Mr. Blue: I will object to that, if the Court please. Just a moment, Miss Walker, I will object on the ground that it is hearsay as to all these defendants, and it is incompetent. There is no foundation laid justifying any conversations had between this witness and Mr. McEvoy.

The Court: The witness may answer.

Mr. Blue: Exception, and the same objection will go to all her testimony with Mr. McEvoy. [Tr. 619.]

(Witness continuing):

First McEvoy recommended to us that we get our money back on the first purchase and buy a second time to buy more because the Plymouth Oil Company had taken a 50 per cent interest, and they would naturally want to get their money back, and the first well was producing 200 barrels a day; and in the next conversation about it he said they were making 300 and it was 2½ per cent, and that they expected they would get 50 cents a share for it, and since the Plymouth Company wanted this stock they would certainly boom the stock so it would go up, so that they would get back their 50 per cent. He said that the stock had formerly been registered at Salt Lake City but it had gone off and they were expecting to have it registered at the time. McEvoy told me at one time that well No. 1 produced 200 barrels, and the next time I saw him he said it was 300." [Tr. R. 321.]

There is no evidence that any of the appellants authorized McEvoy to make the statements that he purportedly made to the witness.

The fact that the witness testified that McEvoy told her that the well produced 200 barrels and at another time 300 barrels, shows conclusively the damage done by evidence, which cannot possibly be traced back to any authorized statement by either of the appellants, or to any scheme of which they were a part.

The very appearance on the witness stand of these two ladies in or past middle age, who testified that they have been induced by false representations made through Mr. McEvoy to purchase stock in Union Associated Mines Company, was in itself harmful to these appellants.

Surely it should require no citation of authority to satisfy this court that the evidence offered and received through the witnesses Mathilda M. Klinger and Grace T. Walker was entirely hearsay as to these appellants and was very prejudicial to the appellants. Obviously, it goes to the very crux of the charges in the Indictment that the defendants did make certain false representations as part of their scheme. The prosecution ought not to be allowed to offer as proof of that scheme, false representations made by a third party—in this instance, Mr. McEvoy—without first showing that the defendants are responsible for the representations so made by him. The court should have refused the evidence and after it was received, the court should have granted the motion to strike it.

The prosecution witness, Charles H. Shomate, testified that he was the County Recorder of Kern County and that according to his record as such County Recorder, it appeared that between December 1, 1938 and December 1, 1939, M. E. Blynn was the owner of the so-called Devil's Den property herein mentioned [Tr. R. 349]; that she became the owner of record on May 9, 1938; that

he had searched his records and could not find thereon any lease of December, 1938, between Gordon and the defendants and others to William S. Millener, nor a record of any assignment of the lease in January, 1939, from Millener to Union Associated Mines Company [Tr. R. 355].

On his cross-examination, he testified that he found of record a quit claim deed from M. E. Blynn to Fred V. Gordon on this property, which deed was filed for record in October, 1941, it being dated October 30, 1941 [Tr. R. 355], and also found a conveyance of the landowner's royalty to Farmers and Merchants National Bank of Los Angeles.

A defense witness, Roy P. Dolly, testified with respect to this transfer, that he had acquired this property for Mr. Gordon in the name of Mr. Dolly's secretary, Margaret E. Blynn; that Mr. Dolly was then acting as the attorney for Mr. Gordon; that Miss Blynn was not acting for herself in acquiring the property but was acting as the trustee for Mr. Gordon at Mr. Dolly's request. The vice of the testimony is that it was offered for the purpose of showing either that Mr. Gordon never had title to the property, or that it was never transferred to Union Associated Mines Company. The objections themselves to the testimony of Mr. Shomate, demonstrate the correctness of the appellants' contention that the evidence of Mr. Shomate was improperly admitted. We quote his testimony in the printed record from pages 347 to 355.

Conclusion.

The long time elapsed between the happening of the events referred to in the Indictment and the return of that Indictment and the further long time that elapsed between the return of the Indictment and the time of trial, may in some measure account for the startling verdicts as a result of which the two "principal" defendants were acquitted and the three minor defendants were convicted on a Conspiracy Count alone, but how ever that may be the constitutional rights of these appellants were invaded when they were not given the speedy trial provided for under the Constitution of the United States.

Furthermore, the errors of law above considered should in our opinion move this court to set aside the verdicts so far as these appellants are concerned and to discharge them.

Dated: April 4, 1946.

Respectfully submitted,

David H. Cannon,

Attorney for Appellants, James H. Collins and Sidney Fischgrund,

Ben L. Blue,

Attorney for Appellants, Sidney Fischgrund and Christopher E. Schirm.